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Summary record of the 869th meeting
Held at Headquarters, New York, on Wednesday, 18 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

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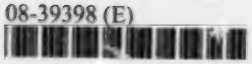

The meeting was called to order at 10.10 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 18 (Basis of liability) (*continued*)

1. **Ms. Traoré** (Observer for Burkina Faso) said that, since draft article 18 was of central importance in the draft instrument, its wording should reflect the expressed concern to strike a balance between the various interests involved. Because of the lack of such a balance in that draft article, her delegation along with other African States had proposed in A/CN.9/658/Add.1 that paragraph 3 should be deleted and that the draft article should be restructured accordingly.

2. **Mr. Bigot** (Observer for Côte d'Ivoire), responding to the statement made by the delegation of Italy at the previous meeting, said that there was, in fact, an imbalance in the burden of proof requirements for shippers as opposed to carriers. Carriers were offered alternative possibilities of relief from liability, thereby benefiting from more advantageous treatment than shippers.

3. **Mr. Lebedev** (Russian Federation) said that, since the draft instrument was intended to regulate questions of obligation and liability in international trade, draft article 18 went to the heart of the matter. It was the result of a compromise and reproduced the provisions of article IV, paragraph 2, of the Hague-Visby Rules in that it listed events or circumstances that could serve to relieve the carrier of liability, as opposed to the Hamburg Rules, which did not set out such a list. However, he questioned the omission from that list of nautical fault, contained in the Hague-Visby Rules, since even in the modern age such accidents could occur. A compromise wording should be included in the draft convention to the effect that the carrier would be exonerated from liability in cases of fault in the navigation or in the management of the ship. The relative lack of success of the Hamburg Rules had been due to their omission of such a provision. It was important to give thought to the future of the draft convention and ensure that it would lend itself to broad application.

4. **Mr. Elsayed** (Egypt) reminded the Commission that the views he expressed were those of all the members of the League of Arab States and stressed the key role of maritime transport companies, which rendered valuable services to developed and developing countries alike. He recalled the provisions of draft article 2 relating to the observance of good faith and draft article 4 relating to the applicability of the proposed instrument in judicial and arbitral proceedings and said that time constraints should not prevent the Commission from attending to the practical matter of achieving a balanced text, particularly since its members were called upon to act as legislators. Everyone had the right to defend their own interests, while justice demanded that all interests should be taken into account. Since draft article 18, paragraph 2, would be nullified in cases where a carrier could not prove the absence of fault, he proposed that the following should be inserted at the beginning of that paragraph: "Unless the claimant proves that the damage was caused by a fault of the carrier or one of its representatives ...". He agreed with the proposal that paragraph 3 should be deleted. Paragraphs 1, 2 and 3 of the draft article seemed to have been framed in isolation from one another and failed to strike a balance between the interests of all the parties concerned.

5. **Ms. Mbeng** (Cameroon) said that if the draft convention was to achieve broad acceptability, there had to be a balance between the interests of shippers and carriers. Serious consideration should accordingly be given to the alternative wording of the draft article proposed in A/CN.9/658/Add.1, which entailed the deletion of draft paragraph 3. Moreover, it might well be difficult for a claimant to prove the unseaworthiness of a ship, as required by draft paragraph 5.

6. **Mr. Oyarzabál** (Observer for Argentina) said that paragraph 2 required a negative proof, which it would be hard to provide. He would have preferred a more positive formulation. The case of fire on the ship, provided for by paragraph 3 (f) should definitely be exempt from liability since it was one of the events that could not be foreseen by the carrier.

7. **The Chairperson** reminded the Commission that the text proposed by the Working Group was the result of a compromise achieved at the end of long and difficult debate and that it had the support of a broad majority.

8. **Ms. Sobrinho** (Observer for Angola) recalled that it had been decided, in the absence of a consensus,

to hold informal consultations to reconsider draft article 12, and wondered whether a similar approach might be taken to draft article 18. In its current wording, it would lead to higher prices for goods in developing countries and thus run counter to the global efforts called for by the General Assembly in support of the Millennium Development Goals, in particular that of poverty reduction. She referred notably to paragraph 68 of the 2005 World Summit Outcome, set forth in General Assembly resolution 60/1, on meeting the special needs of Africa. If draft article 18 were approved in its current wording, her delegation would exercise its right of reservation.

9. **The Chairperson** said that he had called for informal consultations on draft article 12 because he had been unable to identify a prevailing opinion. That was not the case in regard to draft article 18: according to his calculations, there was a two-to-one majority in favour of the proposed wording.

10. **Mr.** Amadou Kane **Diallo** (Senegal) stressed that it was important for the Commission to take into account the views of the African States and the members of the Arab League with respect to draft article 18 in order for an acceptable consensus decision to be reached. According to his calculations, there was not an overwhelming majority in favour of the current wording. In fact, at least 15 delegations had called for the deletion of the draft article.

11. **Mr. Egbadon** (Nigeria) said that equity and fairness should not be sacrificed to the need for a timely decision on draft article 18, which was a central part of the draft convention as a whole. The Commission should therefore ensure that the necessary efforts were made to address draft article 18 in a manner that was satisfactory to all. Otherwise the Commission might give the misleading impression that the views of the entire African continent, the Arab League and some major European countries were not considered to be important. In order to build a consensus, he proposed that informal consultations should be held to review draft article 18.

12. **Ms. Czerwenka** (Germany) agreed that it was important to draw up a draft convention that was acceptable to all delegations. For that reason, those delegations that had expressed concerns about draft article 18 should have an opportunity to try to find a consensus solution in informal consultations. She therefore supported the proposal just made by the delegation of Nigeria.

13. **Mr. Delebecque** (France) pointed out that while informal consultations might prove useful, it would be difficult to discuss draft article 18 in isolation, since it was part of a compromise with widespread implications for other provisions, including limits of liability, reservations and the wording of draft article 27.

14. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation did not agree with the views just expressed by the delegation of France. Informal consultations on draft article 18 could be limited to that particular issue. Draft article 62 on limits of liability, for example, was an entirely separate matter and would not be called into question.

15. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) agreed that it would be extremely dangerous to reopen the compromise package already agreed upon in Vienna. Informal consultations could focus on the specific proposal made by a group of African States in paragraph 12 of their joint comments (A/CN.9/658/Add.1).

16. **Mr. Tsantzalos** (Greece) said that his delegation was in favour of retaining the current wording of draft article 18, which represented a fair and balanced compromise solution. Reopening the discussion of the draft article would only create further complications.

17. **Ms. Carlson** (United States of America) said that her delegation was in favour of retaining draft article 18 in its current form. Every effort had already been made to achieve an acceptable compromise solution. The proposed informal consultations would merely reopen the debate on a number of contentious issues, which could even jeopardize the outcome of the draft convention itself.

18. **Mr. Hu** Zhengliang (China) said that draft article 18 was part of a compromise package on the carrier's liability, and it would therefore not be appropriate to consider it in isolation. If informal consultations were held, they should cover the whole compromise package concerned with the carrier's responsibility, especially the limits of liability of the carrier.

19. **Mr. Imorou** (Benin) pointed out that the maritime industry had evolved considerably since the Hague Rules of 1924. It seemed odd to base arguments for the present draft convention on such a model.

Africa was not one State but many independent States whose concerns must be respected and taken into account. If the Commission failed to adopt that approach, the convention might never be ratified.

20. **The Chairperson** recalled that the total number of delegations opposed to the retention of draft article 18 was still in the minority.

21. **Mr. Moulopo** (Observer for the Congo) said that the Commission should allow concerned delegations to review the provisions of draft article 18 informally in a spirit of compromise and in an effort to achieve a consensus on a fair and balanced basis. The maritime industry had indeed changed significantly since 1924, but draft article 18 took no account of those developments. As a result, the current text would adversely affect the shipper, leading to higher insurance premiums that would increase the price of the goods. Those costs would ultimately be passed on to the final consumer. The draft text was therefore out of step with the national campaigns of African countries to combat poverty and to achieve the Millennium Development Goals.

22. **Ms. Downing** (Australia) stressed that the Commission had a mandate to produce harmonized international trade law. To that end, her delegation supported the proposal to hold informal consultations on draft article 18 in order to reach a compromise solution.

23. **Mr. Kim** Bong-hyun (Republic of Korea) said that, while his delegation was not completely satisfied with the wording of draft article 18, it was willing to support its retention in a spirit of compromise. His delegation was opposed to holding informal consultations on draft article 18 since it did not wish to reopen the debate on that issue.

24. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the text of draft article 18 as a compromise solution. While the wording of the draft article was not entirely satisfactory, progress had been made compared with the Hague-Visby Rules: the nautical fault exception had been eliminated; half of the fire exception had been eliminated; and it had become clear that paragraph 3 of draft article 18 did not represent exonerations but rebuttable presumptions of the absence of fault. However, since draft article 18 was part of a delicate series of compromises, informal consultations, if conducted, should not be limited to a review of the draft article in isolation.

25. **Mr. Sharma** (India) said that his delegation favoured the retention of draft article 18 in its entirety. However, if informal consultations were to be held, they should address draft article 18 exclusively, without the added complications associated with limits of liability.

26. **The Chairperson** said that, notwithstanding the strength of the arguments put forward, notably by the African States and Egypt, the fact remained that the majority of the members of the Commission wished to retain draft article 18 in its entirety. He took it that the Commission accepted the amendment proposed by Japan and Sweden to eliminate the brackets in paragraph 5 (a) (iii) and to replace "including" by "and" in order to align the provision with article 15, subparagraph (c), as amended.

27. *Draft article 18 was approved in substance, with the amendment proposed by Japan and Sweden, and referred to the drafting group.*

The meeting was suspended at 11.30 a.m. and resumed at noon.

Draft article 19 (Liability of the carrier for other persons)

28. *Draft article 19 was approved in substance and referred to the drafting group.*

Draft article 20 (Liability of maritime performing parties) and definitions of "performing party" and "maritime performing party"

29. **Ms. Czerwenka** (Germany) drew attention to the comments of her Government regarding draft article 20 (A/CN.9/658/Add.11, para. 9). Her delegation also had concerns about the definition of "maritime performing party" contained in draft article 1, paragraph 7. The first problem that arose was how to interpret the term "port". From her reading of the definition in draft article 1, paragraph 7, an inland carrier became a maritime performing party once it entered the port, but further clarification of that definition would be helpful. It was also not clear who was responsible for proving where damage had occurred. A provision was needed which gave States with concerns regarding "maritime plus" contracts the flexibility to opt out.

30. **The Chairperson** said that the word "only" in the last sentence of the definition should meet the concerns expressed by the representative of Germany.

31. **Mr. Sato** (Japan) explained that a road carrier that started and ended its journey outside the port area was never a maritime performing party. A land carrier would be a maritime performing party only if it operated exclusively within the port area: for example, a trucker who transported goods between terminals within the port. However, the ambiguity in the definition could perhaps be clarified.

32. **Mr. Miller** (United States of America) said that countries which had ratified the Hamburg Rules had been living with the ambiguity in the definition of the port area for some time. As it was difficult to define the boundaries of a port in the abstract, the Hamburg Rules allowed local port authorities to define the boundaries, and it would be best for the draft convention to leave that issue to be decided country by country. His delegation supported the current text of draft article 20 and the related definitions.

33. **Mr. Elsayed** (Egypt) said that draft article 20, paragraph 2, related to draft article 13, which his delegation had preferred to delete. It was impossible to conceive of a maritime performing party as being exempt from liability.

34. *Draft article 20 and draft article 1, paragraphs 6 and 7, were approved in substance and referred to the drafting group.*

Draft article 21 (Joint and several liability)

35. *Draft article 21 was approved in substance and referred to the drafting group.*

Draft article 22 (Delay)

36. **Ms. Czerwenka** (Germany) said that Working Group III (Transport Law) had debated at length whether agreement must be explicit or could be implied. Since, as drafted, the article contained no explicit reference to an express agreement, she inferred that either an express or an implied agreement was acceptable.

37. **Mr. Mayer** (Switzerland) said that his delegation interrupted the draft article in the same way.

38. **Ms. Downing** (Australia) said that, since the draft article would change the law in Australia dramatically and amount to a reduction of rights of cargo interests, her delegation had always favoured its deletion.

39. **Ms. Slettemoen** (Norway) said that her delegation had also favoured deletion of the draft article but would accept the compromise text on the understanding that carriers could not contract out of their general obligation in respect of delay and that the provision applied without express agreement.

40. **Ms. Peer** (Austria) said that her delegation supported the inclusion of the article as it was drafted, with the interpretation expressed by the representatives of Germany and Switzerland.

41. *Draft article 22 was approved in substance and referred to the drafting group.*

Draft article 23 (Calculation of compensation)

42. **Mr. Elsayed** (Egypt) said that his delegation would like to insert a provision between paragraphs 2 and 3 to the effect that, if there were no goods of the same kind and quality at the place of delivery, a competent court would determine the amount of compensation.

43. **Mr. Morán Bovio** (Spain) said that, in his view, the convention would not be the best place to resolve that question, as arbitration tribunals in most countries established compensation. In most cases, the question would be resolved under domestic law, an area which the convention was not intended to address.

44. *Draft article 23 was approved in substance and referred to the drafting group.*

Draft article 24 (Notice in case of loss, damage or delay)

45. *Draft article 24 was approved in substance and referred to the drafting group.*

46. *Draft article 25 was approved in substance and referred to the drafting group.*

Draft article 26 (Deck cargo on ships) and definitions of "goods", "ship" and "container"

47. **Mr. van der Ziel** (Observer for the Netherlands) said that draft article 26, which extended the normal liability rules to deck cargo, was an essential element of the balance of risk as expressed in the convention. In restricting the freedom of the carrier to carry goods on deck, the article represented an improvement upon the situation under the Hague Rules, which did not cover deck cargo and had therefore allowed carriers to

exonerate themselves of liability in most cases. Draft article 26 shifted the balance in favour of the interests of the shipper.

48. **Mr.** Ibrahima Khalil **Diallo** (Senegal) noted that, although progress had been made on the issue of balance between shipper and carrier interests since the Hague Rules, the shipper's contractual situation under draft article 26 and that under the Hamburg Rules were essentially the same. If anything, the trend in that respect favoured the interests of the carrier: the Hamburg Rules allowed for notice of damage to be given to the carrier within 15 consecutive days after the date of delivery , whereas the draft convention in draft article 24, paragraph 1, limited the notification period to seven days.

49. **Mr. Hu** Zhengliang (China) said that his delegation had no objections to the substance of the text but thought that the reference to the "customs usages and practices of the trade" should be standardized in word order wherever it appeared in the draft convention.

50. **Mr. Morán Bovio** (Spain) said that, in the interest of legal common sense, differences in historical context must be taken into account when comparing the provisions of legal instruments such as the 1978 Hamburg Rules, the current draft convention and other earlier legal documents. It was obvious that in 1978 a message had taken longer to send than in the current era of electronic communications, hence the longer period of time granted for notification of damage under the Hamburg Rules.

51. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that it was untenable for some delegations to defend a series of outdated and unjustifiable provisions of the Hague Rules, which were nearly a century old, when it was expedient, while dismissing inconvenient comparisons to the Hamburg Rules as invalid because they were three decades old. Rather than pursuing such contentious debates, the focus should remain on making progress that favoured both carrier and shipper interests.

52. **The Chairperson** noted that the definitions of "goods", "ship" and "container" contained in draft article 1, paragraphs 24, 25 and 26, were related to draft article 26.

53. **Mr. van der Ziel** (Observer for the Netherlands) asked whether the term "container" in the definition of "goods" should be supplemented by "road and rail cargo vehicle", as per the proposal made by his delegation in its comments (A/CN.9/658/Add.9, para. 9).

54. **Mr. Mollmann** (Observer for Denmark) and **Mr. Sharma** (India) agreed that adding a reference to "road and rail cargo vehicles" was appropriate in draft article 1, paragraph 24.

55. **Mr. Schelin** (Observer for Sweden) said that including a reference to "road and rail cargo vehicles" in the definition of "goods" would cause some confusion. The definition of "goods" already covered "articles of every kind whatsoever", making an explicit mention of road and rail cargo vehicles unnecessary. Moreover, draft article 61, paragraph 2, referred to containers and road or railroad cargo vehicles as things that goods were carried in or on.

56. **The Chairperson** said that, given the divergent views on the proposed amendment, he took it that the Commission wished to retain the current wording of the definition of "goods". The drafting group would be asked to ensure consistency in references to "customs, usages and practices of the trade".

57. *Draft article 26 and draft article 1, paragraphs 24, 25 and 26 were approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.